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THE ARIZONA CORPORATION COMMISSION

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6 IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'S  
7 COMPLIANCE WITH SECTION 271 OF  
THE TELECOMMUNICATIONS ACT OF  
8 1996

Docket No. T-00000A-97-238

10 **STAFF'S REPLY TO QWEST CORPORATION'S**  
11 **COMMENTS ON RECOMMENDED OPINION AND**  
12 **ORDER OF THE ADMINISTRATIVE LAW JUDGE**  
13 **ON QWEST'S PERFORMANCE ASSURANCE PLAN**

13 **I. INTRODUCTION**

14 On April 17, 2002 Qwest Corporation ("Qwest") filed comments ("Qwest's comments")  
15 on the Administrative Law Judge's ("ALJ's") Recommended Opinion and Order on Qwest's  
16 Performance Assurance Plan ("ROO"), released April 4, 2002. Staff offers the following brief  
17 comments to clarify issues raised by Qwest in its comments. Staff will not address every point  
18 raised by Qwest's comments here. Staff will only address points that it believes need to be  
19 clarified as a result of Qwest's comments. Staff stands by all of its positions set forth in its Final  
20 Report on Qwest's Performance Assurance Plan docketed December 24, 2001, unless otherwise  
21 discussed herein.

22 **II. DISCUSSION**

23 **A. The FCC's "Zone of Reasonableness" Standard**

24 Qwest states in its comments that, "...the FCC has emphasized that a plan is appropriate if  
25 it falls within a 'zone of reasonableness.'"<sup>1</sup> Qwest goes on to state that, "the question before this  
26 Commission is whether the plan *submitted by Qwest* meets these criteria..."<sup>2</sup> Staff fundamentally  
27

28 <sup>1</sup> Qwest comments at page 2, emphasis in original

<sup>2</sup> Id. page 2

disagrees with that statement. The FCC's zone of reasonableness standard was simply meant to provide general guidelines for the development of a performance assurance plan ("PAP").<sup>3</sup> It was not intended to place limits on State Commission's discretion in implementing a PAP. Qwest's untenable interpretation of the FCC's standard would result in effectively "tying the Commission's hands" to such an extent that it would be able to do no more than pass on the overall reasonableness of a specific plan proposed by Qwest, regardless of whether other plans might be more appropriate and provide greater incentives to Qwest.

#### **B. Disputed Issue No. 4: K-Table**

Qwest is dissatisfied with Staff's resolution of disputed issue number 4, the use of the K-Table. Staff resolved this issue in the CLECs' favor by rejecting the K-Table. Qwest continues to contend that because a compromise<sup>4</sup> was reached in the ROC collaborative (which included different parties than the Arizona process) Arizona must accept the terms of that compromise. Staff understands that the parties involved in the ROC collaborative were not unanimous in their support of the compromise. Also, the compromise was conceptually flawed in that it changed the critical value for Tier 2 payments, yet Tier 2 payments were not subject to the K-Table.

Staff did request that Qwest supply it with the details of the compromise reached in the ROC. This was so Staff would have additional information that would allow for a more informed decision on this impasse. However, Qwest has somehow construed Staff's request to look at the ROC compromise as binding Staff to accept the terms of the ROC compromise.<sup>5</sup>

Staff continues to reject the use of the K-Table. Staff believes that the basis for a K-Table in statistical theory is, at best, questionable. Qwest did not offer and Staff could not locate any published papers that were subject to legitimate peer review that support the use of a K-Table or K-Table like mechanism. Standard statistical texts contain no information about K-

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<sup>3</sup> See Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 paragraph 433 (1999) ("BANY Order")

<sup>4</sup> In the ROC collaborative certain CLECs agreed to critical values which are more favorable to Qwest in exchange for elimination of the K-Table.

<sup>5</sup> Staff would note that at least one significant participant, WorldCom, in the Arizona PAP proceedings was not part of the ROC compromise.

1 Tables or K-Table like mechanisms.<sup>6</sup> From the perspective of standard statistical practice the K-  
2 Table is unorthodox. In the end, Staff was not persuaded by Qwest's attempt to justify such an  
3 unorthodox method.

4 Qwest advocates the use of the K-Table in order to forgive Qwest for Type I errors.<sup>7</sup>  
5 Staff is not persuaded that forgiveness for Type I error is necessary for two reasons. First, the  
6 CLECs receive no compensation for Type II errors so allowing Qwest forgiveness for Type I  
7 errors seems inequitable.<sup>8</sup> Second, Staff is not convinced that in the context of Qwest's PAP  
8 there is any Type I error to forgive. Type I (and Type II) errors are generally regarded to be the  
9 result of *sampling* error. That is, because samples, and not whole populations, are used some  
10 error is introduced. However, in Qwest's PAP no sampling takes place. Qwest has access to,  
11 and uses, the entire population of data necessary to calculate the various measurements in the  
12 PAP. Thus, Qwest's reported results are not statistical estimates of Qwest's performance, they  
13 are its *actual* performance. When, as is the case in Qwest's PAP, the sample size equals the  
14 population size both Type I and Type II errors do not occur.<sup>9</sup> Qwest has not accepted the above  
15 conclusion but has offered another justification for the use of the K-Table. Qwest has claimed  
16 that their operations are subject to "random variation" and thus any given determination of  
17 disparity can not be regarded as evidence of systematic discrimination against the CLECs.<sup>10</sup>  
18 Thus, Qwest argues that the K-Table's forgiveness is justified.

19 Staff is unpersuaded by this argument as well because if this unspecified variation was  
20 truly random it would be as likely to affect its retail operations as it is to affect its wholesale  
21 operations. Thus, for parity measures (which are the only measures for which the K-Table  
22 applied), the random variation would be as likely to result in false parity conclusions as it is in

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23  
24 <sup>6</sup> See for example: Ramakant Khazanie, *Statistics in a World of Applications*, Fourth Edition, Harper Collins  
College Publishers, 1997 and William H. Greene, *Econometric Analysis*, Macmillian Publishing Company, 1993.

25 <sup>7</sup> In this context a Type I error results when the statistical test indicates that Qwest is not providing parity service  
when in fact they are.

26 <sup>8</sup> In this context a Type II error results when the statistical test indicates that Qwest is providing parity service when  
in fact they are not.

27 <sup>9</sup> Ramakant Khazanie, *Statistics in a World of Applications*, Fourth Edition, Harper Collinc College Publishers,  
28 1997 Page 498

<sup>10</sup> See transcript at: PAP Workshop 1, Volume 1, October 17, 2000: Pg. 62, Lines 11-12; Pg. 63, Lines 4-6  
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1 false disparity conclusions. Also, during the course of the OSS tests conducted by Arizona and  
2 the ROC, well over a hundred system problems were discovered by the testers and remedied by  
3 Qwest. *None* of those problems was attributed to random error. Each of them was attributed to  
4 a definite cause.

5 Staff believes its resolution of this impasse is just and reasonable.

6 **C. Disputed Issue No. 9: Classification of Measurements**

7 In its comments Qwest objects to the ALJ's resolution of this impasse issue. Qwest again  
8 is unhappy that the ALJ has rejected a compromise reached in the ROC. Here Staff notes only  
9 that in Qwest's ROC PAP, Tier II payments begin in the first month of noncompliance after  
10 Qwest has missed the measurement in any two consecutive months in the last year, whereas in  
11 Qwest's Arizona PAP Tier II payments do not begin until the third consecutive month of  
12 noncompliance. Thus, comparing the classification of Tier II measures in the ROC with those in  
13 Arizona is inappropriate. Staff believes its resolution of this impasse is just and reasonable.

14 **D. Commission Authority To Revise The Plan**

15 Qwest comments raise two issues which go directly to the Commission's authority over  
16 the PAP. First, Qwest takes issue with the ALJ's recommendation that "the CLECs' position  
17 that Qwest not be able to change the performance measurements and reporting system unless the  
18 Commission approves it in advance is also important and should be explicitly stated in the PAP."  
19 Qwest Comments at p. 22.

20 Second, with regard to the six-month review, Qwest challenges the ALJ's  
21 recommendation that "the Commission should have the ability to review and modify all the  
22 terms of the PAP" at the six-month review. See Qwest Comments at p. 31.

23 Staff supports the ALJ's recommendations on both points. First, nothing in the Plan now  
24 would give Qwest the unilateral authority to change the performance measurements and  
25 reporting system without Commission approval. Further, Qwest's position on this issue in its  
26 comments is curious at best, and seriously flawed in Staff's opinion. Under Section 252(f) of  
27 the 1996 Act, Qwest is required to submit its SGAT to the Commission for review and approval.  
28 This would of course include any modifications to the SGAT. Qwest's PAP will be an appendix

1 to its SGAT, and as such Qwest must submit any changes it makes to the PAP for Commission  
2 review and approval.

3 Qwest's position that it should be able to make such unilateral changes without  
4 Commission oversight and approval would essentially "gut" the plan of its meaning and  
5 effectiveness. The primary purpose of a Performance Assurance Plan is to provide assurances  
6 that the local market will remain open after Qwest receives Section 271 authorization. Bell  
7 Atlantic New York Order<sup>11</sup> at para. 429. The FCC has stated that "the fact that a BOC will be  
8 subject to performance monitoring and enforcement mechanisms would constitute probative  
9 evidence that the BOC will continue to meet its section 271 obligations and that its entry would  
10 be consistent with the public interest." Id. If Qwest is allowed to unilaterally change important  
11 aspects of the Plan without the Commission's approval in the future, the Commission, or CLECs  
12 for that matter, could never be assured that the incentives initially put in place would remain  
13 adequate to ensure an open, competitive local market in the future. For instance, Qwest might  
14 decide that it was paying too much under the Plan and unilaterally make modifications designed  
15 to reduce its level of penalties under the Plan.

16 In its Comments, Qwest complains that if the ALJ is suggesting that even "minor"  
17 changes be subject to Commission approval, including report data inputs such as USOC tables  
18 and NPA/NXX codes which might change results, the implications would be astounding. Staff  
19 does not believe that anyone intends to make administration of the Plan unduly burdensome for  
20 Qwest and certainly Staff does not believe this to be the ALJ's intent. To address Qwest's  
21 concern, an exception could be made for perfunctory changes that are administrative in nature or  
22 are designed to merely carry out routine maintenance with respect to the PIDs. However, such  
23 exceptions, if the Commission decides that this appropriate, should be agreed upon by all parties.

24 Qwest also appears to be arguing in its Comments, that because there was no formal  
25 "impasse" on this issue, the parties are precluded from raising it, and the Commission, Staff and  
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27 <sup>11</sup> In the Matter of Application by Bell Atlantic New York for Authorization Under  
28 Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the  
State of New York, Memorandum Opinion and Order, CC Docket No. 99-295 (Rel.  
December 22, 1999)("Bell Atlantic New York Order").  
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1 ALJ are precluded from addressing it. See Qwest Comments at p. 22. Staff strongly disagrees  
2 with this position and would note that Qwest's position is inconsistent with the conduct of other  
3 271 Workshops. Staff oftentimes addressed issues in its Final Reports that were not raised to the  
4 level of formal "impasses" during the Workshop. If such an approach were sanctioned, parties  
5 would be encouraged to withhold their positions on issues hoping that by not raising them, their  
6 interpretation would be "deemed" correct after proceedings had concluded. The effectiveness of  
7 evidentiary proceedings and the workshop process would be adversely affected as a result. The  
8 fact that Qwest did not take the issue to a formal impasse in no way constrains or somehow  
9 prevents the Commission from addressing the issue.

10 Staff further supports the ALJ's recommendation that "the Commission should have the  
11 ability to review and modify all the terms of the PAP at the six-month review." Qwest  
12 Comments at p. 21. To attempt to limit changes that the Commission can make to those that  
13 Qwest approves of, makes little sense. Again, this "fox in charge of the hen-house" scenario  
14 would provide little assurance that the Plan was ultimately designed to assure that the local  
15 market would remain open and that Qwest would have adequate incentives to continue to meet  
16 its Section 271 obligations. As experience is gained with the Plan, adjustments may need to be  
17 made to ensure that the Plan is working effectively. This has been an issue from the beginning  
18 of this proceeding and it has always been Staff's position that the Commission should have  
19 authority to make whatever modifications it determines are necessary to the Plan at the six month  
20 review.

#### 21 **E. MISCELLANEOUS**

22 Staff also has two additional comments which it would like to make. The first is directed  
23 to the ALJ's recommendation that payments under the Plan not be considered liquidated  
24 damages and that the QPAP should not foreclose CLECs from attempting to prove actual  
25 damages in excess of the assessments under the Plan. Staff had supported Qwest's position on  
26 this issue because the Texas plan, and others, contained similar provisions. However, Staff  
27 believes the ALJ's reasoning on this point is persuasive. Foreclosing CLECs from attempting to  
28


1 prove actual damages in excess of the assessments under the Plan, operates to insulate Qwest  
2 from liability for inadequate performance

3 Second, Qwest's Plan, at Section 16.0, contains a provision which reads "Qwest will  
4 make the PAP available for CLEC interconnection agreements until such time as Qwest  
5 eliminates its Section 272 affiliate." This is of course inconsistent with Staff's recommendation  
6 in its Final Report that Qwest obtain Commission approval before it be allowed to withdraw its  
7 PAP. Moreover, with regulatory proceedings recently commenced at the Federal level  
8 examining the need for separate Section 272 affiliates, Staff recommends that this provision be  
9 stricken whether or not Staff's other recommendation is adopted.

### 10 **III. CONCLUSION**

11 For the foregoing reasons, Staff recommends that the Commission reject Qwest's  
12 requests for modification of the ALJ's Recommended Opinion and Order.

13  
14 RESPECTFULLY submitted this 9<sup>th</sup> day of May, 2002

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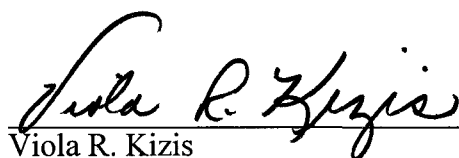
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